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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1954

No. 768

HAROLD B. GORDON

PETITIONER.

v.

MINERVA GORDON and others

HAROLD B. GORDON, *Trustee*,

PETITIONER.

v.

MINERVA GORDON and others

PETITION FOR A WRIT OF CERTIORARI TO THE PROBATE COURT, BRISTOL COUNTY COMMONWEALTH OF MASSACHUSETTS

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PETITION FOR A WRIT OF CERTIORARI TO THE PROBATE COURT, BRISTOL COUNTY COMMONWEALTH OF MASSACHUSETTS

The petitioner prays that a writ of certiorari issue to review two decrees of the Probate Court of Bristol County in the Commonwealth of Massachusetts entered after rescript from the Supreme Judicial Court of Massachusetts. The two decrees involve the administration of the same estate, and identical or closely related cases. The matter of *Minerva Gordon and others* v. *Harold B. Gordon* concerns a petition for declaratory judgment designed to forfeit Harold B. Gordon's rights as beneficiary under a

will. The record therein will be referred to herein as "R". The matter of *Minerva Gordon and others* v. *Harold B. Gordon, Trustee* concerns a petition to remove Harold B. Gordon as trustee under the same will. The record therein will be referred herein as "RR."

Opinions Below

The Probate Court in the matter of *Minerva Gordon and others* v. *Harold B. Gordon* made findings of fact, set forth herein (Appendix, Part A); a decree set forth herein (Appendix, Part B) and a decree following Rescript from the Supreme Judicial Court (Appendix, Part C). The opinion of the Supreme Judicial Court is not yet officially reported but has been unofficially reported in 124 N.E. 2d 228, and is set forth herein (Appendix, Part D). The Supreme Judicial Court also issued a rescript which is set forth herein (Appendix, Part E).

The Probate Court in the matter of *Minerva Gordon and others* v. *Harold B. Gordon, Trustee*, made no specific findings of fact but entered a decree set forth herein (Appendix, Part F) and a decree after rescript from the Supreme Judicial Court set forth herein (Appendix, Part G). The opinion of the Supreme Judicial Court is not yet officially reported but has been unofficially reported at 124 N.E. 2d 236, and is set forth herein (Appendix, Part H). The rescript from the Supreme Judicial Court is set forth herein (Appendix, Part I).

Jurisdiction

The decisions of the Supreme Judicial Court of Massachusetts were entered and its rescripts issued on February 7, 1955. The jurisdiction of this Court rests on 28 U.S.C. Section 1257 (3).

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Questions Presented

1) Whether a decree of a State court which forfeits a vested property right of a son in the estate of his father because of the son's marriage to "a person not born in the Hebrew faith" constitutes judicial enforcement in contravention of the Fourteenth Amendment to the Federal Constitution in that such State action is repugnant to the privileges and immunities clause, the due process clause and the equal protection of the laws clause of said Amendment.

2) Whether such a decree is repugnant to the "establishment" and "free exercise" of religion clauses of the First Amendment.

3) Whether a decree removing a son as trustee under the will of his father, such decree being predicated upon the forfeiture of vested property rights of the son in the estate of his father because of the son's marriage to "a person not born in the Hebrew faith," constitutes judicial enforcement in contravention of the Fourteenth Amendment to the Federal Constitution in that such State action is repugnant to the privileges and immunities clause, the due process clause and the equal protection of the laws clause of said Amendment.

4) Whether such a decree as referred to in Arabic numeral 3 above is repugnant to the "establishment" and "free exercise" of religion clauses of the First Amendment.

Constitutional and Statutory Provisions Involved

The pertinent provisions of the United States Constitution and pertinent Massachusetts statutes read as follows:

1. *Fourteenth Amendment of the Constitution of the United States*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. *First Amendment of the Constitution of the United States*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances.

3. *Massachusetts General Laws, Chapter 191, Section 1*

Every person of full age and sound mind may by his last will in writing, signed by him or by a person in his presence and by his express direction, and attested and subscribed in his presence by three or more competent witnesses, dispose of his property, real and personal, except an estate tail, and except as is provided in this chapter and in chapters one hundred and eighty-eight and one hundred and eighty-nine and in section one of chapter two hundred and nine. A married woman, in the same manner and with the same effect, may make a will.

4. *Massachusetts General Laws, Chapter 231A, Section 1*

The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other

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legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceeding shall not be open to objection on the ground that a merely declaratory judgment or decree is sought thereby and such declaration, when made, shall have the force and effect of a final judgment or decree and be reviewable as such; provided, that nothing contained herein shall be construed to authorize the change, extension or alteration of the law regulating the method of obtaining service on, or jurisdiction over, parties or affect their right to trial by jury. When a declaration of right, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury as of right and as to which a jury trial is duly claimed by the party entitled thereto, or issues which the court, in accordance with the practice of courts of equity, considers should be tried by a jury, such issues may be submitted to a jury in the form of questions, with proper instructions by the court, whether a general verdict be required or not. (Chapter 582, sec. 1 of the Acts of 1945)

Statement of the Case

Joseph Gordon died in 1943 in Attleboro, Massachusetts. He was survived by a widow, who has since died, five daughters and a son. He left a will which was probated in Massachusetts. Under this will your petitioner Harold B. Gordon was one of the executors, sole trustee under Article Eighth of the will and one of three trustees under Article

Ninth of the will, the principal assets of the estate coming in the hands of the petitioner as trustee under Article Eighth of the will being the securities of Interstate Transit Corporation, a bus line operating between Attleboro, Massachusetts, and Providence, Rhode Island, and the securities of the Berlin Street Railway, a bus company operating in Berlin, New Hampshire.

Paragraph Fourteenth of Joseph Gordon's will provided: "If any of my said children shall marry a person not born in the Hebrew faith, then I hereby revoke the gift or gifts and the provisions or provision herein made to or for such child, and I direct that the portion or portions of my estate, and the interest or interests therein which I have by this will given to such child so marrying a person not born in the Hebrew faith shall be paid and made over to that person or persons who would have been entitled thereto under this will if such beneficiary had died before becoming entitled by the provisions hereof to such portion or portions, interest or interests, without leaving lawful issue."

On May 11, 1949, your petitioner married one Veronica Albaugh who was a person not born in the Hebrew faith but who was subsequently converted in that faith. On November 5, 1951, a petition for the removal of Harold B. Gordon, trustee, was filed by four daughters of Joseph Gordon (RR. pp. 1-2). It was not until August 8, 1952, that the four daughters filed a petition to divest Harold B. Gordon of his interest in the estate (R. pp. 1-3). In this petition the four daughters prayed for a decree "that all portions of the estate of the said Joseph Gordon given under the provisions of the will of said Joseph Gordon to Harold B. Gordon are from the date of the marriage of the said Harold B. Gordon vested in the petitioners and Sarah G. Lewitsky." (Sarah G. Lewitsky was the fifth daughter who was named as a respondent in the petition.) (R. p. 3) The Probate Court heard the Petition for Declaratory

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Judgment filed on August 8, 1952, and made fact findings (Appendix, Part B) and a Decree divesting Harold B. Gordon, the petitioner herein, of all beneficial rights in the estate (Appendix, Part C). Thereafter it heard the Petition for Removal on the ground that Harold B. Gordon was unsuitable. During the trial of the Petition for Removal, the findings of fact and the decree of the court divesting Harold B. Gordon of beneficial interest in the estate of his father was offered in evidence and refused (RR. p. 57). The Probate Court dismissed the Removal Petition (RR. p. 3). Harold B. Gordon appealed from the decree of the court in the Petition for Declaratory Judgment and the four sisters appealed to the Supreme Judicial Court from the decree of the court dismissing their Petition to Remove Harold B. Gordon. Both cases were argued on October 25, 1954, and decided by the Supreme Judicial Court on February 7, 1955. The Supreme Judicial Court dismissed the appeal of Harold B. Gordon in the Petition for Declaratory Judgment and sustained the appeal of the four sisters in the removal proceedings. The Supreme Judicial Court used the findings of fact (Appendix, Part B) and the decree (Appendix, Part C) in the declaratory judgment proceeding as a basis for its opinion (Appendix, Part H) in the removal proceeding in order to reverse the decree of the Probate Court which had dismissed the Petition for Removal of Harold B. Gordon as trustee.

Following the rescripts from the Supreme Judicial Court, the Probate Court, Bristol County, entered decrees in accordance therewith as a matter of form (Appendix, Parts C and G). The petitioner herein seeks to review on certiorari the action of the Supreme Judicial Court of Massachusetts leading to the entry of said decrees after rescript by the Probate Court.

The Manner in Which the Federal Questions Are Raised

The Federal questions raised in these cases were presented to the Probate Court in the Defendant's Substitute Answer filed January 6, 1953, which reads as follows:

> "7. Said clause is in violation of the Constitution of the Commonwealth of Massachusetts and the Constitution of the United States of America and in particular that any action by this court whereby his interest in said estate would be forfeited by reason of said marriage would deprive him of rights guaranteed to him by the Fourteenth Amendment of the Constitution of the United States, Article I & II of the Declaration of Rights in the constitution of the Commonwealth of Massachusetts and the rights conferred upon him under the Civil Rights Act, 8 U.S. Code 41 et seq (R.S. 1977 and 1978 et seq." (R. p. 6)

and in the Motion to Amend Substitute Answer which reads as follows:

> "12. In so far as the petition seeks to have the respondent's trusteeship forfeited by reason of Article 14 of said will, said Article if so construed is illegal and unenforceable under the provisions of G.L. (Ter. Ed.) Ch. 151B, the Fair Labor Practice Act of this Commonwealth and an interpretation of the clause which declares him unqualified to serve as trustees hereunder by reason of said Article 14 would be unconstitutional, invalid as against public policy and unenforceable for the reasons more particularly above set forth with reference to his beneficial interests." (R. pp. 7-8)

It was further presented to the Supreme Judicial Court by Amendment filed therein October 25, 1954, and allowed February 2, 1955, by Stanley E. Qua, Chief Justice. Said Amendment appears in the record of the declaratory judgment proceedings in photostatic form following the printed portion of the record and is certified to by the Register of Probate of Bristol County, Commonwealth of Massachusetts, and reads as follows:

MOTION TO AMEND ANSWER

Now comes the respondent Harold B. Gordon and moves to amend his answer by inserting the following new paragraph:

"7A. In further specification of his plea of unconstitutionality under the Fourteenth Amendment of the United States Constitution, the respondent says Article Fourteenth of the will of the testator is unconstitutional in the following respects:

(a) The Article and Court action to enforce it is in violation of the privileges and immunities clause of the Fourteenth Amendment in that it violates the privileges and immunities clause of the Fourteenth Amendment both as to him and his wife and other persons taking by, through or under him.

(b) The Article and Court action to enforce it is in violation of the Fourteenth Amendment in that it deprives the respondent and other persons taking by, through or under him of liberty and of property without due process of law.

(c) The Article and Court action to enforce it is in violation of the Fourteenth Amendment in that it denies to the respondent and other persons taking by through or under him the equal protection of the laws.

(d) The Article and Court action to enforce it is in violation of the Fourteenth Amendment in that it violates constitutional prohibitions imposed by that Amendment and the First Amendment on the states forbidding laws respecting the establishment of religion or the free exercise thereof."

The Supreme Judicial Court in its opinion dealt with the constitutional questions now raised (Appendix, Part D).

Reasons for Issuance of the Writ

The Supreme Judicial Court of Massachusetts has decided substantial questions regarding the Federal Constitution not heretofore determined by this Court. We urge that the questions are of substantial and general importance and that they have been decided erroneously by the Court below.

1. The decisions below raise Federal questions of substance and general importance.

The instant proceedings squarely put in issue before this Honorable Court the constitutionality of judicial enforcement of a discriminatory condition in a will. For the first time this Honorable Court is requested to hear and decide whether a State may divest a beneficiary of his rights under a will because the will provides that his rights shall be divested if he exercises one of the most cherished and fundamental desires of man—to select a wife of his own choosing, regardless of race or religion.

The will provides for forfeiture if a beneficiary marries a person whose parents were not of the Hebrew faith at the time of the birth of such person. The Supreme Judicial Court states in its opinion (Appendix, Part D), "There is

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no condition based on the religious belief of anyone at the time of marriage." The divesting condition is therefore the religious belief of the parents of the spouse at the time of the spouse's birth, the Massachusetts Supreme Judicial Court using the following language, "The parents' religion is prima facie the infant's religion."

It is conceded that the Fourteenth Amendment "erects no shield against private conduct however discriminatory or wrongful." See *Shelley* v. *Kraemer*, 334 U.S. 1, 13. If the will of Joseph Gordon was self-executory, this petitioner would bow to this principle, first enunciated in the *Civil Rights Cases*, 109 U.S. 3. The carrying out of the disputed provision of the will of Joseph Gordon, however, required the action of State courts and of judicial officers in their official capacity. To enforce the forfeiture of the petitioner's rights, four sisters of the petitioner invoked a statute, Massachusetts General Laws, Chapter 231A, sec. 1, set forth herein, for a binding determination that the petitioner's rights were revoked; the Probate Court of Bristol County so decreed; the Supreme Judicial Court of Massachusetts affirmed the Probate Court's decree; the decree of the Probate Court and its fact findings were used in a companion proceeding as a basis for finding your petitioner unsuitable to act as a trustee under the will. Here indeed we have the Commonwealth of Massachusetts acting through the judiciary so as to divest the petitioner of his property rights because of his marriage to "a person not born in the Hebrew faith." It is now too well established to admit of argument that action by the courts of a State may fall within the orbit of State action prohibited by the Fourteenth Amendment.

Shelley v. *Kraemer*, 334 U.S. 1
Hurd v. *Hodge*, 334 U.S. 24
Barrows v. *Jackson*, 346 U.S. 249

The instant case is not one "in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit." *Shelley* v. *Kraemer*, 334 U.S. 1, 19 (1948). It is submitted the purpose of the will, discrimination, was secured only by judicial enforcement by State courts. Cf. *Shelley* v. *Kraemer*, supra at p. 13. In fact, there has been more State action in the instant case than there was in *Shelley* v. *Kraemer*, in that the rights to make agreements in *Shelley* v. *Kraemer* did not depend upon any State statute whereas the right to make a will does depend upon a State statute. (Massachusetts General Laws, Chapter 191, section 1).

The right to make a will is not an inherent, natural or constitutional right, but is purely a creature of statute and as such is subject to legislative regulation and control. In *Irving Trust Co.* v. *Day*, 314 U.S. 556, the court said at page 567, "Rights of succession to the property of a deceased, whether by will or by intestacy are of statutory creation and the dead hand rules succession only by sufferance." In *Thayer* v. *Wellington, et als* 9 Allen (Mass) 283, the court said at page 288: "The power of transmitting property by will is a power to be exercised solely under our statute law." A person must devise his property in accordance with and subject to the limitations provided by statute; otherwise he cannot bequeath it at all.

United States v. *Burnison*, 339 U.S. 87
Thayer v. *Wellington*, 9 Allen (Mass) 283
Fisher v. *Fisher*, 253 N.Y. 260

2. The Supreme Judicial Court decided the Federal questions in a way not in accord with the applicable decisions of this Court.

The dynamic nature of the law, and the genius of the United States Constitution to meet the needs of the people

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of the United States are exemplified by recent decisions of this Court in the restrictive covenant and segregation cases.

Shelley v. *Kraemer*, 334 U.S. 1
Hurd v. *Hodge*, 334 U.S. 24
Barrows v. *Jackson*, 346 U.S. 249
Brown v. *Board of Education of Topeka*, 347 U.S. 483
Bolling v. *Sharpe*, 347 U.S. 497

Each of these decisions constitute an achievement in human affairs in accordance with the spirit of the times.

The challenged provision of the will, paragraph fourteen, is not a condition precedent to a beneficiary securing rights but is a condition subsequent which strips a beneficiary of property interests which have already become vested. The Supreme Judicial Court of Massachusetts concedes that conditions, tending to divest estates, are construed strictly (Appendix, Part D). Courts have been ingenious in finding ways to prevent forfeitures (See cases in New York referred to in opinion of Supreme Judicial Court.) (Appendix, Part D). The English Courts and those of the Dominions have refused to enforce provisions such as that in the instant case. See *Clayton* v. *Ramsden* (1943) A.C. 32. *In Re Ettelson* (1946) Vict. L.R. 217. *In Re Myers* (1947) N.Z. L.R. 828. Some of the States, it is submitted, would refuse to enforce the forfeiture clause now objected to on grounds of public policy alone.

Drace v. *Kleindinst*, 275 Pa. 266, 270
Devlin's Trust Estate, 284 Pa. 11, 13, 14
Jamieson's Estate, 55 D and C (Pa.) 435, 436, 441
Maddox v. *Maddox*, Admr. 11 Grat. (VA) 804

It appears, therefore, that considerations of public policy, and it is respectfully submitted that public policy is a prime

factor in the determination of the effect and meaning of constitutional guarantees, would prevent a forfeiture of the petitioner's rights in England, the Dominions and in many of the States. The instant case, therefore, raises the question whether or not the Fourteenth Amendment to the United States Constitution protects a beneficiary under a will so as to prevent State judicial action which effectuates discrimination, intolerance and domination by the "dead hand,"—a protection which, on grounds of public policy, exists in many jurisdictions without a written constitution.

It seems obvious that a Massachusetts statute or any statutory enactment which should declare that a beneficiary should forfeit his rights as a beneficiary under a will if he should marry a "person not born in the Hebrew faith" would be violative of both the Fourteenth and First Amendments to the Constitution of the United States.

We submit that the court's enforcement of the disputed provision in the will not only amounted to State action in the Constitutional sense but also that it was State action which contravened the guarantees of the Fourteenth Amendment. The courts of Massachusetts placed the sanction and authority of the State behind a provision in a will divesting the petitioner of his rights under the will, and by so doing transformed the disputed provision in the will into a virtual statute which in effect deprived the petitioner of vested property rights because of the religious belief of his wife's parents at the time of his wife's birth.

The action of the courts of Massachusetts is also in contravention of the provisions of the First Amendment imported into the Fourteenth Amendment pursuant to the doctrine of *Cantwell* v. *Connecticut*, 310 U.S. 296, and *Everson* v. *Board of Education*, 330 U.S. 1 (1947).

In *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945) this Court affirmed the principle that the preferred place given to the great democratic freedoms secured by the First Amend-

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ment gives them "a sanctity and a sanction not permitting dubious intrusions."

Judicial enforcement of the disputed provision of the will makes the courtroom an instrument to enforce discrimination on account of belief. It makes the courtroom an agency to perpetuate religious faith. By action of the State, through its tax-supported courts, property already vested in a citizen is taken away from him because of the race or religious faith of his wife's parents. Is this a separation of church and State? Is this the neutrality with respect to religion which the First Amendment seeks? Does the fact that forfeiture is based upon religion at time of birth rather than upon religion at time of marriage (Appendix, Part D) authorize State judicial action to effectuate such forfeiture?

Having divested the petitioner of his rights as beneficiary under the will, the Supreme Judicial Court used the forfeiture as a basis of its opinion (Appendix, Part H) that the petitioner should also be removed as trustee under his father's will. This was done in the face of express fact findings of the Probate Court that the allegations of the removal proceedings that Harold B. Gordon was unsuitable as trustee were not sustained (Appendix, Part F). It is patent that the alleged unconstitutional action of the Supreme Judicial Court in the Petition for Declaratory Judgment brought about the reversal of the Probate Court's fact findings and decree that the allegations in the removal proceedings were not sustained. We, therefore, respectfully submit that this State judicial action is unconstitutional for the same reasons that taint the State judicial action in the Petition for Declaratory Judgment.

It is submitted that law is an achievement ever to be renewed and that this Honorable Court should grant certiorari in the instant case in order that it may be established beyond doubt that any State action to divest ownership of

property or title to office because of race or religious belief of the parents of the wife of a beneficiary under a will is in violation of the Fourteenth Amendment to the Constitution of the United States.

Conclusion

For the reasons above stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SAMUEL ABRAMS,
Counsel for Petitioner
Harold B. Gordon

April 25, 1955

Appendix, Part A

DECREE.

Commonwealth of Massachusetts.

Bristol, ss.

In Equity April 27, 1953.

On the petition in equity of Minerva Gordon and May C. Pite of Miami, Florida; Lillian G. Silverman of Montreal, Canada; Sadye G. Freedman of East Orange, New Jersey; petitioners, against Harold B. Gordon and Yetta Ellen Gordon of Pawtucket, Rhode Island; Sarah G. Lewitsky of Lynn in the County of Essex in said Commonwealth of Massachusetts; Alice F. Fiebiger, Susan O. Fiebiger and Joseph G. Fiebiger, all of New York in the State of New York; Leonore F. Cabot and Victor W. Cabot, Jr., both of said East Orange; Muriel F. Wolf of Hartsdale, New York; Jon David Silverman and Joseph G. Silverman of said Montreal; and Joseph G. Pite of Miami Beach, Florida; respondents, praying that the Court make declarations that under the will of Joseph Gordon, late of Attleboro in said County of Bristol, the respondent Harold B. Gordon has lost all portion or portions of the estate of said Joseph Gordon and the interest or interests given to him by said will, and that said portions are vested in the petitioners and the respondent Sarah G. Lewitsky, and for other relief, it appearing that notice according to the order of the Court has been given all parties interested, and Bernard Freedman, Esquire, having been appointed guardian ad litem for said respondents Susan O. Fiebiger, Joseph G. Fiebiger, Victor W. Cabot, Jr., Jon David Silverman, Joseph G. Silverman, and Joseph G. Pite, minors, and Lewis L. Wadsworth, Jr., Esquire, having been appointed guardian ad litem for said Yetta Ellen Gordon, minor, and all parties

respondent having appeared and answered, and it further appearing that the petitioners have waived their prayers for removal of the respondent Harold B. Gordon as trustee under said will and for an accounting by him, and after hearing and consideration, the Court doth order and decree:

1) that all rights of the respondent Harold B. Gordon as beneficiary under Article NINTH of said will to distributions of income and principal after May 11, 1949, when he married a person not born in the Hebrew faith, are revoked as of that date, and that all rights to distributions of income and principal after that date which would otherwise have been payable to said Harold B. Gordon are vested in equal shares in the petitioners Minerva Gordon, May C. Pite, Lillian G. Silverman and Sayde G. Freedman, and the respondent Sarah G. Lewitsky, payable to them or their issue in accordance with paragraph 3 of Article NINTH of said will;

2) that no declaration is made as to the distribution of income or principal of the share of any daughter of said deceased who dies without issue prior to the time of final distribution since such event may not occur and the persons who might then be interested cannot now be determined;

3) that the respondent Harold B. Gordon does not forfeit his office as trustee under said will by reason of said marriage (this portion of the decree being made without prejudice to petition now pending for removal of said Harold B. Gordon as trustee);

4) that the matter of counsel fees, costs and expenses is reserved pending possible appeal to the Supreme Judicial Court.

WILLIAM E. FULLER,
Judge of Probate Court.

Appendix, Part B

REPORT OF THE MATERIAL FACTS ON DECREE IN EQUITY DATED APRIL 27, 1953.

At the request of certain of the respondents, I make the following report of the material facts:

Joseph Gordon died July 8, 1943, a resident of Attleboro. He left a widow Yetta Gordon, who died September 14, 1948, and six children. Four of the children are the petitioners in this case. The other two children are the respondents Harold B. Gordon and Sarah G. Lewitsky.

The petition was filed August 8, 1952. The petitioners waived their prayers for removal of the respondent Harold B. Gordon as trustee and for an accounting by him.

On May 11, 1949, the respondent Harold B. Gordon married one Veronica Albaugh in a civil ceremony in Elkton, Maryland. She was not a person born in the Hebrew faith. Her parents were Roman Catholic. She was raised in that faith. She lived in Berlin, New Hampshire, and practised there in accordance with the tenets of that faith until she went into the Army early in 1944. She was then about 28 years of age.

She and Harold Gordon had been acquainted since 1938. She had learned of the provisions of the will of Joseph Gordon two or three months after his death. Beginning in 1947 she undertook religious instruction under rabbis. On December 27, 1949, she became a convert to Judaism and received a certificate recognizing her conversion. Later on the same day, she and Harold Gordon went through a rabinnical ceremony of marriage. She was then pregnant with a child born February 9, 1950.

Joseph Gordon was an Orthodox Jew and his children were brought up in the tenets of that faith. About fifty Jewish families lived in the city of Attleboro and the town of North Attleborough. There was an Orthodox Synagogue

in Attleboro. Harold Gordon was not limited in the choice of a wife to a resident of Attleboro. In fact, the woman he did marry was a resident of Berlin, New Hampshire. I find both in fact and in law that the provisions of the FOURTEENTH Article of the will did not operate as an unlawful restraint on marriage.

From the religious point of view of the Orthodox Jew a person who is converted to Judaism becomes, with minor exceptions, as though born a Jew. This concept is not accepted by all Jews, however. Some hold that the conversion has no retroactive effect. In any event, in the present case the marriage took place May 11, 1949. At that time Mrs. Gordon was not in any sense Jewish or Hebrew and it could not then be said that she was born in the Hebrew faith. Her conversion did not occur until more than seven months later.

There was much testimony as to the variety of meanings and lack of meaning, from an ecclesiastical point of view and otherwise, of the words "born in the Hebrew faith" singly and collectively. The word "Hebrew" and the word "Jewish" are interchangeable in usage. I find no such uncertainty in the meaning of these words as to make their application to the facts in this case too difficult.

Harold Gordon's sisters did not know of his marriage at the time it occurred. There was already a sharp cleavage in the family in which the petitioners were on one side and Harold Gordon and Mrs. Lewitsky on the other. This cleavage has continued and much bitterness has developed between the parties. The respondents claim that the petition was not brought in good faith, but I find that the petitioners did bring this petition in good faith, acting within their rights. They had not waived any rights that they might have had under the will.

WILLIAM E. FULLER,
Judge of Probate Court.

Filed May 14, 1953.

Appendix, Part C

DECREE AFTER RESCRIPT.

Commonwealth of Massachusetts.

Probate Court.

Bristol, ss.

In Equity March 14, 1955.

On the petition in equity of Minerva Gordon and May C. Pite of Miami, Florida; Lillian G. Silverman of Montreal, Canada; Sadye G. Freedman of East Orange, New Jersey; petitioners, against Harold B. Gordon and Yetta Ellen Gordon of Pawtucket, Rhode Island; Sarah G. Lewitsky of Lynn in the County of Essex in said Commonwealth of Massachusetts; Alice F. Fiebiger, Susan O. Fiebiger and Joseph G. Fiebiger, all of New York in the State of New York; Leonore F. Cabot and Victor W. Cabot, Jr., both of said East Orange; Muriel F. Wolf of Hartsdale, New York; Jon David Silverman and Joseph G. Silverman of said Montreal; and Joseph G. Pite of Miami Beach, Florida; respondents, praying that the Court make declarations that under the will of Joseph Gordon, late of Attleboro in said County of Bristol, the respondent Harold B. Gordon has lost all portion or portions of the estate of said Joseph Gordon and the interest or interests given to him by said will, and that said portions are vested in the petitioners and the respondent Sarah G. Lewitsky, and for other relief, and Bernard Freedman, Esquire, having been appointed guardian ad litem for said respondents Susan O. Fiebiger, Joseph G. Fiebiger, Victor W. Cabot, Jr., Jon David Silverman, Joseph G. Silverman, and Joseph G. Pite, minors, and Lewis L. Wadsworth, Jr., Esquire, having been appointed guardian ad litem for said Yetta Ellen Gordon, minor, after rescript, and after hearing and consideration, the Court doth order and decree

1) that said Harold B. Gordon, Sadye G. Freedman, and Lillian G. Silverman, as they are trustees under said will, are directed to pay out of principal on account of costs and expenses, to Lee M. Friedman, Esquire, counsel for petitioners, $618.00; to Stuart Macmillan, Esquire, counsel for Harold B. Gordon, $1869.55; to Samuel E. Angoff, Esquire, counsel for Sarah G. Lewitsky, $1000.00;

2) that in accordance with said rescript the decree of this Court made on the 27th day of April, 1953, is affirmed.

WILLIAM E. FULLER,
Judge of Probate Court.

Appendix, Part D

MINERVA GORDON & others *vs.* HAROLD B. GORDON & others.

Bristol. October 25, 1954. — February 7, 1955.

Present: QUA, C.J., LUMMUS, WILKINS, SPAULDING & WILLIAMS, J.J.

WILKINS, J. Joseph Gordon of Attleboro died in 1943, survived by a widow, who has since died, and five daughters and a son. This petition by four daughters seeks a binding determination as to whether the son Harold, a respondent, has lost rights under the will by reason of paragraph 14 thereof, which provides: "If any of my said children shall marry a person not born in the Hebrew faith, then I hereby revoke the gift or gifts and the provision or provisions herein made to or for such child, and I direct that the portion or portions of my estate, and the interest or interests therein which I have by this will given to such child so marrying a person not born in the Hebrew faith shall be paid and made over to that person or persons who would have been entitled thereto under this will if such beneficiary had died before becoming entitled by the provisions hereof to such portion or portions, interest or interests, without leaving lawful issue." Other respondents include the fifth daughter, Sarah Lewitsky, and the executors under the will of Joseph Gordon.

After hearing, a decree was entered providing "that all rights of the respondent Harold B. Gordon as beneficiary under Article Ninth of said will to distributions of income and principal after May 11, 1949, when he married a person not born in the Hebrew faith, are revoked as of that date, and that all rights to distributions of income and principal after that date which would otherwise have been payable to said Harold B. Gordon are vested in equal shares in the petitioners Minerva Gordon, May C. Pite, Lillian G. Silverman and Sadye G. Freedman, and the respondent Sarah G. Lewitsky, payable to them or their issue in accordance with paragraph 3 of Article Ninth of said will." Harold ap-

pealed. The petitioners also appealed from the decree "so far as it relates to Sarah G. Lewitsky."

The judge made a report of these material facts found by him. On May 11, 1949, Harold married Veronica Albaugh in a civil ceremony in Elkton, Maryland. Veronica was not a person born in the Hebrew faith. Her parents were Roman Catholic, and she was raised in that faith. She lived in Berlin, New Hampshire, and practised there in accordance with the tenets of that faith until in 1944 at the age of 28 she went into the army. Veronica and Harold had been acquainted since 1938. She learned of the provisions of the will two or three months after the testator's death. Beginning in 1947 she undertook religious instruction under rabbis. On December 27, 1949, she became a convert to Judaism and received a certificate recognizing her conversion. Later on the same day Harold and she went through a rabbinical ceremony of marriage. She was then pregnant with a child born on February 9, 1950.

Joseph Gordon was an orthodox Jew, and his children were brought up in the tenets of that faith. About 50 Jewish families lived in the city of Attleboro and the town of North Attleborough. There was an orthodox synagogue in Attleboro. Harold was not limited in the choice of a wife to a resident of that city. "I find both in fact and in law that the provisions of the Fourteenth Article of the will did not operate as an unlawful restraint on marriage." From the religious point of view of the orthodox Jew, a person who is converted to Judaism becomes, with minor exceptions, as though born a Jew. This concept, however, is not accepted by all Jews. Some hold that the conversion has no retroactive effect. On May 11, 1949, when the marriage took place, Veronica "was not in any sense Jewish or Hebrew and it could not then be said that she was born in the Hebrew faith." Her conversion did not occur until more than seven months later.

"There was much testimony as to the variety of meanings

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and lack of meaning, from an ecclesiastical point of view and otherwise, of the words 'born in the Hebrew faith' singly and collectively. The word 'Hebrew' and the word 'Jewish' are interchangeable in usage. I find no such uncertainty in the meaning of these words as to make their application to the facts in this case too difficult."

1. The respondents contend that the judge was plainly wrong in finding that at the time of her marriage on May 11, 1949, Veronica "was not in any sense Jewish or Hebrew and it could not then be said that she born in the Hebrew faith." It is argued also that the statement is inconsistent with the finding that from the religious viewpoint of the orthodox Jew a convert becomes, with minor exceptions, as though born a Jew. The findings, however, were focused upon the date of the marriage, at which time, if at all, the provisions of paragraph 14 must be capable of being understood and applied. The arguments of the respondents would equally embrace a conversion 50 years after the marriage. Should it be necessary to wait the entire lifetime of a spouse to see if he or she might become a convert to Judaism, the purpose of the provision would be nullified. See *Denfield, petitioner*, 156 Mass. 265, 269. Regardless of the dogmatic dispute as to the retroactive effect of conversion, we think that the provision as to marriage with "a person not born in the Hebrew faith" must be judged in this case on the facts as they stood on May 11, 1949. The only certain thing then was that Veronica since 1947 had received religious instruction from rabbis.

The objection is made that the finding that there is no uncertainty in the phrase, "born in the Hebrew faith," is not justified by the testimony, and as a statement of law "is not consistent with the legal conclusions adopted by almost all the courts which have considered this problem and made it a basis for their decision." That is not, however, quite what the finding was. Referring to this phrase and to the words "Hebrew" and "Jewish," the judge said,

"I find no such uncertainty in the meaning of these words as to make their application to the facts in this case too difficult." We think that what the Judge meant is clear. He was ruling that the testator used the word "born" not in an abstruse sense such as might be understood by a theologian but in its ordinary meaning of physical birth. "'Words in a will are to be given their ordinary meaning unless an intention to use them in some different sense is shown.' *Smith* v. *Livermore*, 298 Mass. 223, 234." *Franklin Square House* v. *Siskind*, 322 Mass. 556, 559.

2. Whether the words "Jewish faith" are sufficiently definite is a question of more difficulty. The courts with whose conclusions the judge's finding is said to be inconsistent are either English or in the Dominions. Of late years testamentary conditions seeking to divest estates on the contingency of marriage outside the Jewish religion have been held void for uncertainty in the English courts. *Clayton* v. *Ramsden*, [1943] A. C. 320 ("if my said daughter . . . shall at any time after my death contract a marriage with a person who is not of Jewish parentage and of the Jewish faith"). *In re Blaiberg*, [1940] 1 Ch. 385 ("should any child or grandchild of mine at any time whether before or after my decease marry any person not of the Jewish faith"). *In re Donn*, [1944] 1 Ch. 8 ("If any child of mine shall intermarry with anyone not of the Jewish faith, or if any child of mine shall intermarry with anyone whose parents were not of the Jewish faith at the time of the birth of the person so intermarrying with any child of mine"). *Re Moss's Trusts*, [1945] 1 All E. R. 207 ("if any child or grandchild of mine shall intermarry with any person not a member of the Jewish faith"). *In re Ettelson*, [1946] Vict. L. R. 217 ("should any child of mine marry anyone not of the Jewish religion and according to the rites and ceremonies of the Jewish church"). *In re Myers*, [1947] N. Z. L. R. 828 ("contracting marriage out of the Jewish

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faith"). These decisions turn upon a rule of construction that where a condition subsequent will divest an estate the court must be able to see from the beginning precisely on what event the vested estate will determine. *Clavering* v. *Ellison*, 7 H. L. Cas. 707, 725. Under this rule of "peculiar stringency" the matter is treated "as one to be decided as it were in vacuo, simply on the construction of the clause." Lord Wright in *Clayton* v. *Ramsden*, *supra*, 329. The rule does not apply to a limitation or a condition precedent. *Re Wolffe's Will Trusts*, [1953] 2 All E. R. 697 (income to granddaughter and on her marriage "to a person of the Jewish faith and the child of Jewish parents" to transfer the principal, but not if she "shall marry a person not of the Jewish faith and not the son of parents of the Jewish faith"). See *In re Allen*, [1953] 1 Ch. 810 (to the eldest son of his nephew "who shall be a member of the Church of England and an adherent to the doctrine of that Church"); *S. C.* [1954] 1 Ch. 259. For a summary of English law relating to conditions respecting particular religions, see Williams on Wills, 267 et seq.

It may be conceded that conditions, whether precedent or subsequent, tending to defeat estates are construed strictly. See Page on Wills (3d ed.) § 1280. Nevertheless we are unable to accept the doctrine of the English courts which would impress a fatal uncertainty upon the testator's language in the case at bar. Lord Romer, one of the principal expositors of the doctrine, said of "the Jewish faith" in *Clayton* v. *Ramsden*, [1943] A. C. 320, 334: "It would surely depend on the extent to which the particular individual accepted the tenets and observed the rules. I cannot avoid the conclusion that the question whether a man is of the Jewish faith is a question of degree." This is hardly the view to which we have very recently given expression in *Goldman, petitioner*, 331 Mass. 647,[1] an adop-

[1] Mass. Adv. Sh. (1954) 745.

tion case under G. L. (Ter. Ed.) c. 210, § 5B, inserted by St. 1950, c. 737, § 3, requiring the judge "when practicable" to "give custody only to persons of the same religious faith as that of the child." We there said (page 649[1]): "The mother did not cease to be a Catholic, even if she failed to live up to the ideals of her religion. If that were the test of belonging to a religious faith it is feared that few could qualify for any faith. The petitioners are of the Jewish faith and intend to bring up the twins in that faith." We do not believe the question of fact as to the religious faith of Veronica should be determined in vacuo (see *Clayton* v. *Ramsden*, *supra*, 329) any more than should any other question of fact.

Our conclusion that the language of the testator is not too uncertain to be enforced is aided by decisions on an analogous question. In most States where the issue has arisen, conditions imposed by testators requiring, or prohibiting, education or membership in a certain faith have been upheld. *Delaware Trust Co.* v. *FitzMaurice*, 27 Del. Ch. 101, 112-113 ("so long as she lives up to and observes and follows the teachings and faith of the Roman Catholic Church, and no longer"). *Barnum* v. *Mayor & City Council of Baltimore*, 62 Md. 275, 291 (withdraw from priesthood). *Matter of Lesser*, 158 Misc. (N. Y.) 895, 900-901 (grandchildren to be "given a normal Jewish, liberal education"). *Matter of Kempf*, 252 App. Div. (N. Y.) 28, 32-33 (grandchildren to be "brought up and educated in the faith of and according to the Roman Catholic Religion"), affirmed 278 N. Y. 613. *Magee* v. *O'Neill*, 19 S. C. 170, 186, 190 (grandchild "educated in some Roman Catholic female seminary or school," and "reared as a Roman Catholic in the communion and faith of her deceased father"). *In re Paulson's Will*, 127 Wis. 612, 618 ("attend the regular meetings of worship of the Emmanuel Church near the village of Cash-

[1] Mass. Adv. Sh. (1954) at 746.

ton, Wisconsin, when not sick in bed, or prevented by accident or other unavoidable occurrence"). Holding to the contrary are Pennsylvania and probably Virginia. *Drace* v. *Klinedinst*, 275 Pa. 266, 270 (grandchildren "provided they remain faithful to a particular religion"). *Derlin's Trust Estate*, 284 Pa. 11, 13, 14 ("to employ the net income . . . in the education, maintenance and support of my grandson . . . but during his minority, only so long as he is brought up and reared in the Roman Catholic faith"). *Jamieson's Estate*, 55 D. & C. (Pa.) 435, 436, 441 ("if any of my daughters or their issue at the time of my decease be members of the Roman Catholic Church or shall thereafter join," legacies to cease). *Maddox* v. *Maddox's Administrator*, 11 Grat. (Va.) 804, 805, 814-815 (niece "during her single life, and forever, if her conduct should be orderly, and she remain a member of Friends Society").

The basis of the majority rule seems to be that an inducement by way of gift to adopt or to adhere to a particular religious belief is not a denial of religious freedom. The beneficiary can reject the gift. Even in Pennsylvania an inducement which operates, as in the case at bar, upon the choice of a wife has been held to be too remote to be regarded as coercive of religious faith. *Clayton's Estate*, 13 D. & C. (Pa.) 413, 415 (should son have "married a woman of the Roman Catholic faith").

We do not think that the provision in paragraph 14 is open to the valid charge of vagueness which was made in *Turner* v. *Evans*, 134 Md. 238 (marry a "social equal"), or in *Watts* v. *Griffin*, 137 N. C. 572 (forbidding marriage to a "common woman").

3. We cannot confine the condition in paragraph 14 only to marriages contracted in the testator's lifetime. Paragraph 14 is designed to take effect if any child "shall marry a person not born in the Hebrew faith." Not only are "shall marry" apt words to designate any future time, but

the apodosis of the sentence contains language almost identical with that used in paragraph 15,[1] which purports to deprive a beneficiary who contests the will of his interests under it. Paragraph 14 provides: "then I hereby revoke the gift or gifts and the provision or provisions herein made to or for such child, and I direct that the portion or portions of my estate, and the interest or interests therein which I have by this will given to such child . . . be paid and made over to that person or persons . . . ." Paragraph 15 obviously can apply only to a condition arising subsequent to the testator's death. The same word or phrase when used in different parts of the will is presumed to have the same meaning. *Tyler* v. *City Bank Farmers Trust Co.* 314 Mass. 528, 534. *Agricultural National Bank* v. *Schwartz*, 325 Mass. 443, 448. *Hill* v. *Aldrich*, 326 Mass. 630, 632. The word "revoke" was undoubtedly used in a broad, rather than in a technical, sense. *Phillips* v. *Ferguson*, 85 Va. 509, 515. If there be inconsistency in making the gift over to those who would have been entitled "if such beneficiary had died before becoming entitled," that is to say, at the testator's death rather than at the date of the proscribed marriage, any inconsistency is outweighed by other considerations.

4. But it is said that paragraph 14, as we have construed it, places an unreasonable restraint on marriage. This introduces a question new in this jurisdiction, where the restraints on marriage so far upheld have been those made

[1] "If any beneficiary under this will shall contest the validity, or institute any proceedings to set it aside in whole or in part, then I hereby revoke the gift or gifts and the provision or provisions herein made to or for him, her or them, and I do direct that the portion or portions of my estate and the interest or interests therein which I have given to him, her or them by this will shall be paid and made over to that person or persons who would have been entitled thereto under this will, if such beneficiary had died before becoming entitled by the provisions hereof to such portion or portions, interest or interests, without leaving lawful issue."

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with the intent to provide for the beneficiary while single, and not to induce the beneficiary to remain single or to forsake a present spouse. *Otis* v. *Prince*, 10 Gray, 581. *Harlow* v. *Bailey*, 189 Mass. 208, 212. *Ruggles* v. *Jewett*, 213 Mass. 167, 171. Thus, there have been held valid: A restraint on the remarriage of the testator's widow. *Knight* v. *Mahoney*, 152 Mass. 523, 525. A gift of the principal of a trust fund to a daughter "at the decease of her husband Frank E. Coe or upon her permanent and legal separation from him." *Coe* v. *Hill*, 201 Mass. 15, 17, 21-22. A trust created for the purpose of keeping property away from a son "so long as" he "shall remain the husband" of his present wife. *Cowley* v. *Twombly*, 173 Mass. 393. A gift to a nephew "on condition that at the time of the death" of the settlor the nephew "is not married to his present wife." *Chamberlain* v. *Van Horn*, 246 Mass. 462.

It is generally held in this country that partial restraints on marriage are valid unless unreasonable. Am. Law of Property, § 27.15. Scott on Trusts, § 62.6. Restatement: Property, § 425. 122 A. L. R. 7. Thus testamentary gifts conditioned on the beneficiary not marrying a specified individual have been upheld. *Turner* v. *Evans*, 134 Ma. 238, 241. *Graydon's Executors* v. *Graydon*, 8 C. E. Green, 229, 237-238. *Matter of Seaman*, 218 N. Y. 77, 81. *Osborne's Petition*, 21 D. & C. (Pa.) 293, 295. A similar result has been reached where the condition was against marrying into a named family. *Phillips* v. *Ferguson*, 85 Va. 509, 513. In *Pacholder* v. *Rosenheim*, 129 Md. 455, a requirement that a niece marry with the consent of her parents was held to be good, and there was an added statement (pages 462-463) that a second requirement of not marrying outside the Jewish faith was also good.

In *Matter of Liberman*, 279 N. Y. 458, 464, referring to *Matter of Seaman*, 218 N. Y. 77, 81, it was said: "The court there cited with approval Jarman on Wills: 'Condi-

tions not to marry a Papist, or a Scotchman; not to marry any but a Jew . . . have also been held good.' Indeed, such conditions seem to have been sustained whenever challenged. (. . . Jarman on Law of Wills [7th ed.], p. 1497.)" The condition in the *Liberman* case, that the legatee should marry only with the consent of his mother, brother, and sister, was found upon evidence to be intended to restrain marriage with anyone but a Jewess. It was held invalid because of the consent feature. Other New York cases call valid a partial restraint such as in the case at bar. *Matter of Weil*, 124 Misc. (N. Y.) 692, 695 ("different religious faith from mine"). *Matter of Salomon*, 156 Misc. (N. Y.) 445, 447 ("any person not of the Jewish faith"). *Matter of Rosenthal*, 204 Misc. (N. Y.) 432; *S. C.* 283 App. Div. (N. Y.) 316; affirmed 307 N. Y. 715 (marriage with a person "not born in the Jewish faith and who shall not be of Jewish blood"). In each case, however, the court found a way to prevent a forfeiture of the estate. In the *Rosenthal* case there is a vigorous dissent by three judges. 307 N. Y. at page 719.

The only American case which might be said to hold a testamentary condition against marrying outside a certain religion to be unreasonable could rest on the ground that in the circumstances the restriction of the beneficiary's choice of spouse to the Society of Friends would operate as a complete prohibition of marriage. *Maddox* v. *Maddox's Administrator*, 11 Grat. (Va.) 804, 808-809.

The contention is made that a restriction conditioned upon the religious faith of the parents of the prospective wife at the time of her birth is unreasonable. The question is not whether the testator used good judgment in including paragraph 14 in his will or whether we should approve or disapprove his action. What we have to decide is whether he was prevented from doing as he did by any rule of law. We are unable to discover that he was.

5. Constitutional objections have been raised to the judicial enforcement of paragraph 14. It is said that the decree violates the guaranty of religious freedom and is in contravention of the First and Fourteenth Amendments to the Constitution of the United States and arts. 1 and 2 of the Declaration of Rights. It is also claimed with respect to the Fourteenth Amendment that there have been a violation of the privileges and immunities clause, a denial of liberty and property without due process of law, and a denial of the equal protection of the laws. We are not impressed with these arguments. What the testator did was to make gifts of his own property subject to the legatee marrying "a person not born in the Hebrew faith." The parents' religion is prima facie the infant's religion. *Purinton* v. *Jamrock*, 195 Mass. 187, 200. *Goldman, petitioner*, 331 Mass. 647, 653.[1] All that the testator did was in effect to require that his property should not be received by a son or daughter who should marry one born to parents not of the Hebrew faith at the time of the child's birth. There is no condition based on the religious belief of anyone at the time of marriage. In support of the constitutional arguments there are cited *Shelley* v. *Kraemer*, 334 U.S. 1, *Hurd* v. *Hodge*, 334 U. S. 24, *Barrows* v. *Jackson*, 346 U. S. 249, *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, and *Bolling* v. *Sharpe*, 347 U. S. 497, which seem to us to involve quite different considerations from the right to dispose of property by will. G. L. (Ter. Ed.) c. 191, § 1.

6. The petitioners' appeal "so far as it relates to Sarah G. Lewitsky" is an attempt to terminate her interest in the trusts because of paragraph 15 of the will which she is now charged with violating by reason of the answer she has filed to the present petition and the part she has taken in opposing it. See 156 A. L. R. 980. This issue is not raised in any paper filed in the Probate Court relative to the petition,

[1] Mass. Adv. Sh. (1954) 745, 750.

which, on the contrary, prays for a declaration that Harold's portions of the estate are from the date of his marriage "vested in Minerva Gordon, Lillian G. Silverman, Sadye G. Freedman, May C. Pite, and Sarah G. Lewitsky." The decree is in accord with the prayer, which was never amended. The probate judge made no finding on the question, and could not have considered the issue open.[1] Essential features of due process, notice and opportunity to be heard were lacking. *Matter of Sleeper*, 251 Mass. 6, 21. *Higgins* v. *License Commissioners of Quincy*, 308 Mass. 142, 147-148. *Matter of Keenan*, 313 Mass. 186, 201. *Becker Transportation Co. Inc.* v. *Department of Public Utilities*, 314 Mass. 522, 526. *O'Leary, petitioner*, 325 Mass. 179, 182. *Piona* v. *Alcoholic Beverages Control Commission*, 332 Mass. ——, ——.[2] See *Hart* v. *Wiltsee*, 19 Fed. (2d) 903, 924 (C.C.A. 1). The petitioners' appeal discloses no error of law. But as they have appealed from a decree, formally at least in their own favor, their appeal will be dismissed. *Langley* v. *Conlan*, 212 Mass. 135, 140. *Walsh* v. *District Court of Springfield*, 297 Mass. 472, 474. *Sherrer* v. *Sherrer*, 320 Mass. 351, 353.

7. Costs and expenses of appeal shall be in the discretion of the Probate Court.

Petitioners' appeal dismissed.
Decree affirmed.

[1] We are informed by counsel that a petition seeking a declaration that Sarah has lost her interest in the estate was filed in the Probate Court on August 6, 1953.

[2] Mass. Adv. Sh. (1954) 923, 926.

Appendix, Part E

Commonwealth of Massachusetts.
SUPREME JUDICIAL COURT.
For the Commonwealth.
At Boston, February 7, 1955.

In the Case of

MINERVA GORDON & others
vs.
HAROLD B. GORDON & others.

pending in the Probate Court for the County of Bristol

ORDERED, That the register of probate and insolvency in said County, make the following entry under said case in the Docket of said Court, viz:

Petitioners' appeal dismissed.
Decree affirmed.
Costs and expenses of appeal to be in the discretion of the Probate Court

FREDERICK L. QUINLAN, *Clerk.*

By the Court
February 7, 1955
A true copy,
Attest:
MARCELLAS D. LEMAINE,
Asst. Clerk

BRIEF STATEMENT of the grounds and reasons of the decision.

See opinion on file.

Appendix, Part F

DECREE.

Commonwealth of Massachusetts.

Bristol, ss.

At a Probate Court holden at Taunton in and for said County of Bristol, on the third day of June in the year of our Lord one thousand nine hundred and fifty-three

On the petition of Minerva Gordon and May C. Pite of Miami in the State of Florida, Lillian G. Silverman of Montreal, Canada, and Sadye G. Freedman of West Orange in the State of New Jersey, praying that Harold B. Gordon may be removed from his office and trust as trustee under the will of Joseph Gordon, late of Attleboro, in said County,

It appearing that due notice has been given to said Harold B. Gordon and to all persons interested according to the order of the Court who appeared by counsel and that the allegations set forth in said petition are not sustained,

After hearing,

It is decreed that said petition be dismissed.

WILLIAM E. FULLER,
Judge of Probate Court.

Appendix, Part G

Bristol, ss.

Commonwealth of Massachusetts.

At a Probate Court holden at Taunton in and for said County of Bristol, on the fourteenth day of March in the year of our Lord one thousand nine hundred and fifty-five On the petition of Minerva Gordon and May C. Pite of Miami in the State of Florida, Lillian G. Silverman of Montreal, Canada, and Sadye G. Freedman of West Orange in the State of New Jersey, praying that Harold B. Gordon may be removed from his office and trust as trustee under the will of Joseph Gordon, late of Attleboro, in said County. It appearing that after rescript, that said Harold B. Gordon is unsuitable for the faithful discharge of said trust:

It Is Decreed, that said Harold B. Gordon be and he is hereby removed from his offices and trusts of trustee under said will of Joseph Gordon.

William E. Fuller, *Judge of Probate.*

Bristol ss. Probate Court

A true copy James B. Kelley, Jr.

Attest: *Register.*

Appendix, Part H

MINERVA GORDON & others *vs.* HAROLD B. GORDON, trustee.

Bristol. October 25, 1954. — February 7, 1955.

Present: QUA, C.J., LUMMUS, WILKINS, SPAULDING, & WILLIAMS, J.J.

WILKINS, J. This petition for the removal of Harold B. Gordon, trustee under the will of Joseph Gordon, late of Attleboro, is an outgrowth of the family troubles referred to in *Gordon* v. *Gordon, ante*, ——,[1] and *Gordon* v. *Gordon, ante*, ——.[2] The petitioners are four daughters of Joseph Gordon: Minerva Gordon, Lillian G. Silverman, Sadye G. Freedman, and May C. Pite. The petition alleges that the petitioners, the respondent, and Sarah G. Lewitsky, are the children of Joseph and Yetta Gordon; that Yetta has died; that the petitioners are interested in a trust fund under the will of Joseph; and that the respondent "has improperly and wrongfully misused and abused and is continuing to misuse and abuse his position, authority, and power as trustee for his own use and advantage, at the expense and to the detriment of the petitioners, beneficiaries of said trust, and is otherwise unsuitable for the discharge of said trust." A decree recited that "the allegations set forth in said petition are not sustained" and dismissed the petition. The petitioners appealed.

The judge made no report of the material facts found by him, but the evidence is reported. *New England Trust Co.* v. *Commissioner of Corporations & Taxation*, 315 Mass. 639, 643-644. *Friedman* v. *Hazen*, 328 Mass. 233, 234. *291 Washington St. Inc.* v. *School St. Liquors, Inc.* 331 Mass. 150.[1]

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[1] Mass. Adv. Sh. (1955) 49.
[2] Mass. Adv. Sh. (1955) 55.
[1] Mass. Adv. Sh. (1955) 163.

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By paragraph 8 of his will Joseph Gordon left any interest he might have in any business which he might be then conducting either individually, or as manager of a corporation the major portion of the capital stock of which he might own, to Harold upon the following trusts: To carry on and conduct the business; to act as a director or officer; using his own judgment and discretion, to vote the shares of stock on all matters on which a stockholder may vote; and to pay over the income and eventually the principal to the trustees of the residue under paragraph 9. The trustees of the residue were Yetta, Harold, and Sadye, with Lillian as an alternate. They were to pay the income, subject to an annuity to Yetta, 20% to Harold and 80% to all the children including Harold. At the expiration of 20 years from the death of Yetta, the principal was to be paid in the same manner as the income.

The testator died in 1943. The trustees for both trusts named in the will were appointed. Upon the death of Yetta in 1948 Lillian was apoointed as successor trustee of the residuary trust under paragraph 9. The principal assets of the trust under paragraph 8 were the capital stock of Interstate Transit Corporation, a bus company operating out of Attleboro, and Berlin Street Railway Company in New Hampshire. Harold became president, treasurer, director, and general manager of Interstate Transit Corporation. Other directors and officers varied from time to time, but were for the most part sisters of Harold or their husbands.

In *Gordon* v. *Gordon, ante,* ——,[2] a petition for a declaratory decree, we have held that the probate judge was not in error in declaring that Harold's marriage was with "a person not born in the Hebrew faith" and was in violation of

[2] Mass. Adv. Sh. (1955) 55.

paragraph 14[1] of the will, and that his right to receive income and principal has been terminated. We do not think that Harold's appointment as trustee was thereby automatically revoked as being a "gift," or a "provision," or a "portion" of, or an "interest" in, the estate. We do not pause to consider whether Harold's contesting the validity of paragraph 14 in the proceeding for a declaratory decree was in violation of paragraph 15.[2] The important facts are that there has been a great deal of dissension between Harold and most of his sisters arising since his administration of the trust, and that Harold is no longer a beneficiary under paragraphs 8 and 9. We think that the testator would not have wanted him to continue as trustee in these circumstances, that it would not be for the best interests of the trust that he remain as trustee under either paragraph, and that he is now unsuitable for the discharge of those trusts. *Wilson* v. *Wilson*, 145 Mass. 490, 493. *Comstock* v. *Bowles*, 295 Mass. 250, 260. *Shirk* v. *Walker*, 298 Mass. 251, 260. See *Morgan* v. *Morgan*, 267 Mass. 388, 392.

There is nothing in the respondent's contention that the

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[1] "If any of my said children shall marry a person not born in the Hebrew faith, then I hereby revoke the gift or gifts and the provision or provisions herein made to or for such child, and I direct that the portion or portions of my estate, and the interest or interests therein which I have by this will given to such child so marrying a person not born in the Hebrew faith shall be paid and made over to that person or persons who would have been entitled thereto under this will if such beneficiary had died before becoming entitled by the provisions hereof to such portion or portions, interest or interests, without leaving lawful issue."

[2] If any beneficiary under this will shall contest the validity, or institute any proceedings to set it aside in whole or in part, then I hereby revoke the gift or gifts and the provision or provisions herein made to or for him, her or them, and I do direct that the portion or portions of my estate and the interest or interests therein which I have given to him, her or them by this will shall be paid and made over to that person or persons who would have been entitled thereto under this will, if such beneficiary had died before becoming entitled by the provisions hereof to such portion or portions, interest or interests, wthout leaving lawful issue."

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court in the present petition cannot take cognizance of what happened in the proceedings for a declaratory decree. *Matter of Keenan*, 314 Mass. 544, 548. *Matter of Welansky*, 319 Mass. 205, 210. *Assessors of Lawrence* v. *Arlington Mills*, 320 Mass. 272, 273-274.

The decree is to be reversed, and a new decree is to be entered removing the respondent as trustee under the will of Joseph Gordon.

So ordered.

Appendix, Part I

Commonwealth of Massachusetts.
SUPREME JUDICIAL COURT.
For the Commonwealth.
At Boston February 7, 1955

In the Case of
MINERVA GORDON & others
vs.
HAROLD B. GORDON, trustee.

pending in the Probate Court for the County of Bristol

ORDERED, That the register of probate and insolvency in said County, make the following entry under said case in the Docket of said Court, viz:

Decree to be reversed, and a new decree to be entered removing the respondent as trustee under the will of Joseph Gordon.

By the Court FREDERICK L. QUINLAN, *Clerk.*
February 7, 1955

BRIEF STATEMENT of the grounds and reasons of the decision.

See opinion on file.

A true copy,
Attest:
WILLIAM P. GRANT, *Clerk.*

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